Supreme Court, U.S.
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No. 08-1488

In The
Supreme Court of the United States

HK SYSTEMS, INC.,

Petitioner,

v.

EATON CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner, HK Systems, Incorporated ("Petitioner") has presented compelling reasons to grant the Petition, where the Seventh Circuit Court of Appeals' (the "Seventh Circuit") decision affirming summary judgment in favor of Respondent Eaton Corporation ("Respondent") does not conflict with a decision of this Court or another Court of Appeals, and where the Seventh Circuit's opinion does not implicate an important federal question.

CORPORATE DISCLOSURE STATEMENT

Eaton has no parent corporation, nor are there any publicly traded companies that own more than ten percent of the stock of Eaton.

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INTRODUCTION

Petitioner fundamentally mischaracterizes the lower court proceedings by suggesting that this case implicates sweeping civil procedure concerns and presents an unsettled conflict between the Courts of Appeals. Petitioner contends that the Seventh Circuit's decision:

> [S]tands for the principle that a district court is entitled to raise a new issue that Rule 50(b) would bar a party from raising and, furthermore, that a district court can decide that new issue based on an earlier pre-trial summary judgment record, not the trial record.

(Pet. at 21.) The Seventh Circuit, however, merely held that after a jury verdict a district court may reconsider its earlier denial of summary judgment when such a ruling involves a pure question of law. The Seventh Circuit found:

> [I]n revisiting the issue of causation after the trial [the judge] was not depriving [Petitioner] of the benefit of any of the evidence presented at the trial, because that evidence did not bear on the judge's decision. He had denied summary judgment on the basis of his reading of the indemnification clause, and in reconsidering the denial after the trial he continued to treat the meaning of the clause as a pure issue of law, unrelated to anything that had gone on at the trial.

(Pet. App. at 5a.)

Accordingly, once the District Court properly construed the contract, no jury issue existed because all material undisputed facts demonstrated that Petitioner's claim failed as a matter of law. Thus, this case is not about whether the District Court for the Eastern District of Wisconsin ("District Court") infringed Petitioner's Seventh Amendment rights. Nor is it about the District Court's authority to examine "new" legal theories when deciding a Rule 50 motion, or even the sufficiency of the trial evidence. Rather, this case is about nothing more than the interpretation and application of a contractual indemnification provision – a question that was properly decided under state law by the District Court and rightly affirmed by the Seventh Circuit.

STATEMENT OF THE CASE

A. Factual Background – The District Court Proceedings.

1. Petitioner misstates the origins of its obligation to build the IBP material handling system.

Petitioner asserts that it "acquired from Eaton-Kenway" a construction project, but the undisputed facts plainly show that Petitioner did not assume any construction contract when it purchased Eaton-Kenway. (Pet. at 9.) Rather, Petitioner solicited and negotiated such a contract after buying Eaton-Kenway.

In 1994, Petitioner and Respondent began negotiations for Petitioner's acquisition of Eaton-Kenway, a division of Respondent primarily engaged in the construction of material handling systems. (Pet.

at 8.) On January 12, 1995, Petitioner, Respondent and Eaton-Kenway entered into an Asset Purchase Agreement under which Petitioner acquired Respondent's business unit. *See* Statement of Uncontested Facts at ¶ 4, United States District Court for the Eastern District of Wisconsin Docket Index 97 *filed* Aug. 22, 2005.[1] The transaction closed on February 13, 1995, after the parties completed a month-long due diligence period. (*Id.* at ¶ 1.)

While Petitioner and Respondent's negotiations for the Eaton-Kenway assets were under way, IBP Corporation ("IBP") issued a request for proposals to several companies that constructed material handling systems. (*Id.* at ¶¶ 18, 20, 21.) Petitioner and Respondent were two of the companies that received IBP's request. In the fall of 1994, Respondent and Alvey Corporation ("Alvey") decided to jointly submit a bid to IBP. (*Id.* at ¶ 23.) IBP rejected that joint bid. (*Id.* at ¶ 91.) Petitioner chose not to submit a bid. (*Id.* at ¶¶ 18, 21, 35, 62.) However, because Petitioner was in the same business as Respondent prior to the acquisition, it was well aware of the bid process and the subject matter of IBP's request. (*Id.* at ¶ 16.)

Respondent and Alvey further discussed their joint bid with IBP and resubmitted their proposal. (*Id.* at ¶¶ 23, 42, 80.) In December 1994, IBP issued a two-sentence letter of intent stating that it intended to buy a material handling system from Respondent and Alvey. (*Id.* at ¶ 25.) However, no contract would be entered into until there was further system design,

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[1] Hereafter the United States District Court for the Eastern District of Wisconsin's Docket Index is referred to as "DI."

completion of a system simulation, and negotiation of the contract's terms and conditions. (*Id.* at ¶¶ 32 – 34.) By the close of the Eaton-Kenway sale on February 13, 1995, however, Respondent and Alvey had not entered into a contract with IBP and significant terms remained unsettled. (*Id.* at ¶ 93.)

After Petitioner purchased Eaton-Kenway, it took over the extensive negotiations with IBP and submitted a revised bid for the material handling system. (*Id.* at ¶ 62.) IBP rejected Petitioner's bid. Petitioner also changed the structure of Respondent's previously proposed deal. (*Id.* at ¶¶ 65, 66.) Specifically, Petitioner notified IBP that Alvey, who had anticipated contracting directly with IBP, would now act as a subcontractor under Petitioner's supervision. (*Id.* at ¶¶ 42, 43, 122.) By late February 1995, however, Petitioner and IBP were expressing concern that a contract had not yet been reached and that a number of issues remained unresolved. (*Id.* at ¶ 59.)

Petitioner submitted a second revised bid to IBP in early March 1995. (*Id.* at ¶ 46.) IBP asked Petitioner to provide assurance that the proposed system would achieve a specified throughput rate (*i.e.*, the speed at which the system could process cases of product). (*Id.* at ¶ 70.) After Petitioner conveyed such assurance (and convinced IBP to forego a simulation), IBP accepted Petitioner's bid. (*Id.* at ¶¶ 71-78.) Petitioner and IBP agreed upon the terms and conditions of the proposed contract, and executed a 550-page highly detailed contract on March 23, 1995 (the "March 23rd Contract"). (*Id.* at ¶¶ 75-78.) Petitioner executed a separate subcontract with Alvey two months later. (*Id.* at ¶ 49.)

As the above facts demonstrate, no contract existed between Petitioner and IBP at the time of the Eaton-Kenway acquisition. (Pet. at 9.) It is undisputed that Respondent: (1) had no control over the negotiation of the March 23rd contract; (2) was not a party to the March 23rd contract; (3) did not perform any aspect of the March 23rd contract; (4) did not interfere with the performance of the March 23rd contract; and (5) did not receive any payment or compensation from IBP. (DI 97 at ¶¶ 2, 28, 36, 52, 69, 74, 75, 77-83.) Therefore, rather than "acquiring" a construction project from Eaton-Kenway, Petitioner bid for the work and negotiated the terms of an agreement well after it purchased Eaton-Kenway.

For more than two years, Petitioner attempted to perform the March 23rd contract. Ultimately, however, IBP became dissatisfied with Petitioner's work and the work of its subcontractor, Alvey. Of particular concern to IBP was its belief that the material handling system did not operate at the specified throughput rate. (*Id.* at ¶ 41.) The March 23rd contract, however, failed to specify what criteria to use when testing the material handling system to ascertain its throughput capacity. (*Id.* at ¶¶ 40, 41.) As a result, two years into the performance of the March 23rd contract, Petitioner and IBP could not agree on how to conduct a final acceptance test to confirm whether the system that Petitioner built operated at the specified throughput rate. (*Id.*) Consequently, IBP took the position that the system was incomplete and unacceptable, and hired another company to complete the job. This ultimately led IBP to sue Petitioner in Nebraska (the "Nebraska Litigation") for breach of the March 23rd contract, breach of express and implied warranties, negligence,

fraud, and deceptive trade practices. (*Id.* at ¶¶ 98, 100.) On July 20, 2001, Petitioner and IBP settled the Nebraska Litigation. (*Id.* at ¶ 3.)

2. Petitioner misrepresents the claims asserted in the Nebraska Litigation.

Petitioner incorrectly asserts that IBP based the Nebraska Litigation on claims grounded largely on statements made by Eaton-Kenway before Petitioner purchased Eaton-Kenway. (Pet. at 10.) Four of the seven counts asserted by IBP, however, arose under the March 23rd contract to which Respondent was never a party. (DI 97 at ¶ 100.) Of the remaining three Counts IBP asserted (1) Petitioner conceded that the negligence claim (Count V) was not covered by the indemnity provision (*id.* at ¶ 128); (2) the Nebraska court dismissed the fraudulent inducement claim (Count VI) because the statements Respondent made prior to Petitioner's purchase of Eaton-Kenway were not fraudulent or deceptive (*id.* at ¶¶ 102, 103); and (3) the Nebraska deceptive trade practices act claim (Count VII) could not have been based on Respondent's conduct prior to the sale of Eaton-Kenway because the Nebraska court found that such conduct was not fraudulent or deceptive. (*Id.*) Accordingly, the entire Nebraska Litigation was premised on a dispute as to whether Petitioner fulfilled its obligations and warranties under the March 23rd contract, and whether Petitioner was negligent and deceptive during its performance of such contract. There was no claim that survived judicial scrutiny for which Petitioner could have been liable as a result of Respondent's acts or omissions prior to the sale of Eaton-Kenway. Indeed, the Nebraska Litigation proceeded for over six months before IBP asserted in an amended complaint

that Eaton-Kenway's actions were relevant; an assertion that the Nebraska court dispatched on summary judgment. (*Id.* at ¶¶ 98, 99, 100.) In fact, Petitioner aggressively sought summary judgment on the grounds that Eaton-Kenway's conduct created no legal obligations or rights of IBP. Petitioner's arguments persuaded the Nebraska court which held: "As [Petitioner/HK] aptly argues, the representations advanced by IBP either predate the written contract and are barred by the parol evidence rule, or the representations constitute expressions of opinion or sales pitches and not statements of fact upon which IBP has shown that it reasonably relied." (*Id.* at ¶ 103.)

3. Petitioner misstates the basis of the District Court's decision.

After settling the Nebraska Litigation, Petitioner sought indemnification from Respondent under the 1995 Asset Purchase Agreement. Respondent refused the request, asserting that Petitioner's losses were not covered by the indemnity because the losses resulted solely from Petitioner's conduct after it bought Eaton-Kenway. After Respondent's refusal, Petitioner filed a lawsuit in the District Court seeking indemnification.

In August 2005, Respondent and Petitioner filed cross-motions for summary judgment with the District Court. *See* DI 95-103 *filed* Aug. 22, 2005. Respondent argued that it was entitled to judgment as a matter of law because there was no contract between Eaton-Kenway and IBP at the time of Petitioner's acquisition. The crux of Respondent's argument, therefore, was that Petitioner's subsequent liability to IBP resulted

solely from Petitioner's voluntary acts of bidding for, negotiating and entering into a contract with IBP, acts for which Eaton-Kenway could have no culpability. *See* DI 96 at pp. 14-22 *filed* Aug. 22, 2005.

In an order entered February 9, 2006, the District Court denied Respondent's motion and granted Petitioner partial summary judgment on liability. *See* DI 133 *filed* Feb. 9, 2006. Respondent filed a motion to reconsider, arguing that the District Court erred in finding that Petitioner had proven that Respondent ***potentially*** caused Petitioner's losses. Respondent also argued that the District Court applied an incorrect standard and that Petitioner must prove that its losses were actually caused by Respondent. *See* DI 136 at pp. 2-6, 8-11 *filed* Feb. 24, 2006. On May 24, 2006, the District Court granted Respondent's motion for reconsideration, and held that the potential liability standard was not applicable. As such, the District Court required Petitioner to show that an act or omission of Respondent actually caused Petitioner's losses. *See* DI 147 at pp. 4-6 *filed* May 24, 2006. The District Court failed, however, to accept Respondent's argument that the indemnification provision only allowed Petitioner to recover if Respondent had directly caused Petitioner's losses.

Respondent repeatedly asserted, in both pretrial motions and at trial, that no duty to indemnify could exist because, as a matter of law, Respondent could not have caused the losses Petitioner incurred when it settled the Nebraska Litigation. Respondent also asked for an order finding that no contract existed between Eaton-Kenway and IBP. *See* DI 163 *filed* July 10, 2006; DI 165 *filed* July 10, 2006; DI 183 *filed* July 11, 2006; DI 352 at 603:2-17, 605:7-25 *filed* Feb. 15,

2007; DI 325 *filed* Sept. 14, 2006; DI 326 *filed* Sept. 13, 2006; DI 361 *filed* Mar. 19, 2007; DI 376 *filed* Apr. 23, 2007. The District Court declined to rule on this question of law prior to trial. (DI 352 at 612:11-613:17.)

Trial began on September 11, 2006. The jury was not asked to determine whether a contract existed between Eaton-Kenway and IBP. (*Id.* at 603:2-17, 605:7-25.) Nor was the jury instructed that no such contract existed or that Petitioner voluntarily entered into a contract with IBP. (*Id.* at 603:2-17, 605:7-25.) Rather, Petitioner asked the jury to award it the costs it incurred to settle the Nebraska Litigation. At trial, and over Respondent's objection, Petitioner relied extensively upon the Eaton-Kenway comments Petitioner successfully argued were non-actionable to the Nebraska court. *See* DI 178 *filed* July 11, 2006; DI 351 at 494:20-23 *filed* Feb. 15, 2007; DI 352 at 647:12-19, 657:12-21, 659:20-22, 660:4-7, 660:13-22, 661:9-16 *filed* Feb. 15, 2007. The jury found in Petitioner's favor and awarded it approximately $3 million.

Pursuant to Rule 50, Respondent filed a motion for judgment as a matter of law at the close of Petitioner's case. *See* DI 326 *filed* Sept. 13, 2006. Respondent renewed its motion at the close of the evidence. *See* DI 325 *filed* Sept. 14, 2006. At the conclusion of trial, the District Court gave Respondent the opportunity to supplement its motion after the trial transcripts were produced to the parties. *See* DI 353 at 730:5-733:11 *filed* Feb. 15, 2007. Accordingly, Respondent filed a supplemental Rule 50 brief in March 2007. *See* DI 361 filed Mar. 19, 2007. When Petitioner asked the District Court to enter judgment on the verdict the court refused, asserting that there were issues

remaining that should be addressed in post-trial briefing. *See* DI 353 at 730:20-731:24.

Following trial, Respondent also filed a motion to reconsider the February 9, 2006 Order denying Respondent's motion for summary judgment. *See* DI 358-359 *filed* Mar. 19, 2007. In a June 18, 2007 Order (the "June 18th Order"), the District Court determined that it erred in denying Respondent's request for summary judgment and that the majority of Petitioner's indemnification claims should have been dismissed. (Pet. App. at 1-23.) Citing its fundamental obligation to "get the matter right," the District Court granted Respondent's summary judgment motion and vacated the jury verdict. (*Id.* at 2.) The District Court recognized that the interpretation and application of the contractual indemnification provision was a question of law that should have never been submitted to the jury and, therefore, the Court denied as moot Eaton's Rule 50 motions. (*Id.* at 23.)

In its June 18th Order, the District Court determined it had been "clearly wrong" in its prior interpretation of the causation standard contained in the parties' indemnification agreement. (*Id.* at 12.) The District Court found that its original interpretation—the interpretation urged by Petitioner—fostered "absurd results" by making Respondent liable for "virtually any claim related to a transferred asset." (*Id.* at 12, 15.) Thus, the June 18th Order corrected this error by holding that Respondent's obligation to indemnify Petitioner arose:

> [O]nly where [Respondent] or Eaton-Kenway's act or omission (or a pre-closing occurrence) directly [gave] rise to a claim against

> [Petitioner].... [However,] if a significant intervening and superseding event separated the act, omission or occurrence from the claim, a loss ensuing from the claim could not be fairly said to result from the claim.

(*Id.* at 13.)

Applying this standard to Petitioner's claim, the District Court entered judgment for Respondent pursuant to Rule 56, concluding no reasonable jury could find that IBP's breach of contract and breach of express and implied warranty claims against Petitioner resulted from Eaton-Kenway's conduct. (*Id.* at 18.) This was because the "integrated contract between [Petitioner] and IBP and [Petitioner's] partial performance of the contract broke any casual link between any act or omission of Eaton-Kenway, or any pre-closing occurrence and IBP's contract and warranty claims." (Pet. App. at 34a.) Additionally, the District Court found Petitioner "was not entitled to indemnification for costs associated with IBP's fraud in the inducement claim because the Nebraska court found that [Respondent's] statements were not fraudulent or admissible." (*Id.* at 19-20.)[2]

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[2] The June 18th Order left one remaining issue unresolved, namely whether Petitioner was entitled to indemnification in relation to IBP's deceptive trade practices claim. Respondent moved for a partial reconsideration arguing that liability should be resolved as a matter of law. On October 12, 2007, the District Court granted Respondent's motion and entered summary judgment in its favor.

B. Factual Background – The Seventh Circuit Proceedings.

On January 11, 2008, Petitioner filed its brief with the Seventh Circuit challenging the District Court's decision. In its appeal, Petitioner largely ignored that the District Court granted summary judgment pursuant to Rule 56. Instead, as it does here, Petitioner attempted to frame the appealable issue as one implicating Rule 50, asking whether "the district court abused its discretion when, without notice, it raised new legal theories never raised or preserved by [Respondent] at trial and then vacated the jury verdict on that basis." *See* IIK Systems, Inc.'s Seventh Circuit Court of Appeals Brief and Appendix at p. 1 *filed* Jan. 11, 2008.

The Seventh Circuit disagreed with Petitioner's characterization and noted that the "substantive issue" on appeal was one of Wisconsin law – namely, the proper scope of an indemnification clause contained within a contract for the sale of a business. (Pet. App. at 1a.) The Seventh Circuit found that while the District Court's reconsideration of summary judgment after a jury verdict may seem "odd," it was entirely permissible when the basis for the ruling was a pure question of law (*i.e.*, the proper construction of a contract). (*Id.* at 3a.) Thus, Petitioner mischaracterizes the basis of the Seventh Circuit's decision when it asserts that the Seventh Circuit permitted an improper Rule 50 ruling.

Dissatisfied with the Seventh Circuit's decision, on February 18, 2009, Petitioner filed a petition for rehearing *en banc* asserting that the District Court improperly considered legal arguments not presented

within the Rule 50 motions. It also for the first time challenged the actions of the District Court as infringing upon its Seventh Amendment rights. Further, as Petitioner does here, it claimed that the Seventh Circuit's decision caused an obvious and dramatic split among jurisdictions. Yet, the Seventh Circuit's opinion, which unanimously upheld the District Court's decision, makes no suggestion that anything done by the District Court caused the slightest bit of controversy or concern. Nor does the opinion by Judge Posner indicate the court perceived its decision as causing a split within the circuits or, more remarkably, directly conflicting with United States Supreme Court jurisprudence.[3]

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[3] Petitioner repeatedly states that Respondent "waived" its causation argument by failing to ask the District Court to interpret the phrase "resulting from" in its Rule 50 motions. Such a statement is categorically incorrect, as is the suggestion that Respondent had to throw itself at the "mercy" of the District Court. Respondent's Rule 50 motion argued a direct causation standard extensively. Respondent argued that as a matter of law it could not have caused IBP's claims for breach of contract and breach of warranty because a contract did not exist until March 23, 1995 – more than a month after Petitioner purchased Eaton-Kenway. The Seventh Circuit echoed this argument in its opinion when it said: "[Petitioner's] claim is even weaker because it wants us to rule that Respondent insured it against liability for breach of a contract that hadn't been made yet. For all we know, had Eaton-Kenway not been sold to [Petitioner] the contract between Eaton-Kenway/Alvey and IBP would have looked completely different from the contract that IIK negotiated." (Pet. App. at 9a.) Respondent also argued a direct causation standard when it asserted it was entitled to judgment as a matter of law on the fraud and deception claims because Respondent's conduct had been found non-actionable by the Nebraska court. *See* DI 325 *filed* Sept. 14, 2006; DI 326 at p. 8 *filed* Sept. 13, 2006.

On March 3, 2009, the Seventh Circuit summarily denied the petition for rehearing, noting "all the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*." March 3, 2009 Order of the United States Court of Appeals for the Seventh Circuit Docket Number 07-3596. Accordingly, every judge sitting on the Seventh Circuit has rejected the same arguments Petitioner now contends are worthy of *certiorari*.

REASONS FOR DENYING THE PETITION

A. The Decision Of The Seventh Circuit Does Not Conflict With The Decisions Of Any Other Courts of Appeals.

1. The Petition is premised on the incorrect assertion that the District Court ruled on Respondent's Rule 50 motion rather than the reality that the District Court reconsidered Respondent's request for summary judgment.

Review on a writ of *certiorari* is not a matter of right, but one of judicial discretion. Sup. Ct. R. 10. As such, a petition for a writ of *certiorari* will be granted only when a petitioner demonstrates that a "compelling reason" exists for such action. *Id.* Petitioner presents no compelling reason for this Court to exercise discretionary jurisdiction over a district court's grant of summary judgment on a matter of state law. Instead, in a vain attempt to create a federal issue, Petitioner predicates its entire Petition on a straw argument – a contorted characterization of

what happened in the lower courts designed solely to obfuscate the real issues of this case. Specifically, the Petition is premised on the legal fiction that the District Court ruled on Respondent's Rule 50 motions. The record could not be more clear, however, that the District Court reconsidered and ruled solely upon Respondent's summary judgment motion and denied Respondent's Rule 50 motions as moot. (Pet. App. at 39a.)

As discussed *supra*, in August 2005, Respondent filed a motion for summary judgment in which it argued that Respondent could not be required to indemnify Petitioner because Petitioner's liability to IBP necessarily resulted from Petitioner's voluntary act of entering into a contract with IBP and its attempted performance of that contract. *See* DI 96 at pp. 14-22 *filed* Aug. 22, 2006. At that time, the District Court denied Respondent's motion for summary judgment based largely on its interpretation of the indemnification provisions contained within the Asset Purchase Agreement. Specifically, the provisions provided in relevant part:

> 10.1 *Indemnification of the Buyer.* [Respondent] shall indemnify [Petitioner] (collectively, the "Buyer Indemnified Parties") and hold each of the Buyer Indemnified Parties harmless from and against any and all damages, losses, deficiencies, actions, demands, judgments, costs and expenses (including attorneys' and accountants' fees) of or against any of the Buyer Indemnified Parties resulting from . . . (iii) any act or omission of [Respondent] or any occurrence of a matter with respect to the Subject Assets or the Subject

> Business relating to or arising out of the period on or before the Closing Date . . . .
>
> 10.2 *Indemnification of the Seller.* [Petitioner] shall indemnify [Respondent] (collectively, the "Seller Indemnified Parties") and hold each of the Seller Indemnified Parties harmless from and against any and all damages, losses, deficiencies, actions, demands, judgments, costs and expenses (including attorneys' and accountants' fees) of or against any of the Seller Indemnified Parties resulting from . . . (iii) any act or omission of [Petitioner] or any occurrence of a matter with respect to the Subject Assets or the Subject Business relating to or arising out of the period after the Closing Date . . . .

(Pet. App. at 22a-23a.)

As the case proceeded, the District Court judge "began to suspect that in [his] pretrial rulings [he] had incorrectly or inadequately interpreted the indemnification provision." (Pet. App. at 13a.) Specifically, the District Court determined that its earlier contract interpretation "[led] to absurd results." (Pet. App. at 24a.) Thus, upon further consideration, the District Court determined that the indemnification provision required Respondent to indemnify Petitioner only when Respondent or Eaton-Kenway's acts or omissions directly gave rise to a claim against Petitioner. (Pet. App. at 27a.) If a significant intervening event separated Respondent's act from the claim, a loss ensuing from the claim could not be said to "result" from Respondent's act. (*Id.*)

Applying its revised interpretation of the indemnification provision, the District Court found that no reasonable jury could find that Eaton-Kenway's conduct resulted in any harm to Petitioner. The District Court concluded that because no contract existed to build the IBP material handling system until after Petitioner purchased Eaton-Kenway, any problems with developing the system could not be attributable to Respondent. (Pet. App. at 33a-35a.) Therefore, it vacated the jury verdict and denied Respondent's Rule 50 motion for judgment as a matter of law as moot. (Pet. App. at 38a-39a.)

On appeal, the Seventh Circuit affirmed the District Court's decision stating:

> [Petitioner] should not have signed the contract with IBP without first making sure that its new acquisition, Eaton-Kenway, would be able to fulfill the duties that the contract placed on its new parent. Had the sale not taken place – had [Respondent] rather than [Petitioner] contracted with IBP – [Respondent] might have insisted on terms that would have protected itself from liability if it could not perform up to IBP's expectation. It had no opportunity to do this. That became [Petitioner's] opportunity, and it muffed it.

(Pet. App. at 7a.)

In light of the Seventh Circuit's decision, all of Petitioner's bases for granting *certiorari* fail. First, Petitioner is patently incorrect when it states "there is no question" that the District Court improperly "vacated the jury verdict and entered judgment as a

matter of law based on a ground never advanced by any party in their pre- or post-verdict [Rule 50] motions." (Pet. at 17.) Rather, the Rule 50 motions were never considered by the District Court because, in resolving the dispute on a question of law, the trial and Rule 50 motions became irrelevant.

Second, there is no merit to Petitioner's argument that the District Court is prohibited from reconsidering summary judgment when the original denial was based on an erroneous contract interpretation. While the District Court may have initially believed that questions of fact required a trial, this belief stemmed from an interpretation of the indemnification provision that the District Court realized was incorrect.

It should be noted that Petitioner cites no case law to support its assertion that a district court lacks authority to correct an earlier error in contract interpretation and, in light of the revised interpretation, enter summary judgment. Instead, Petitioner mischaracterizes the record and advances specious claims that the cases relied upon by the Seventh Circuit are "not on point." (Pet. at 20.) For example, Petitioner questions why the Seventh Circuit relied upon *Chemetall GMBH v. ZR Energy, Inc.*, 320 F.3d 714 (7th Cir. 2003) when "nothing in *Chemetall* even suggests that a court of appeals may review after trial a summary judgment denied on the sufficiency of evidence . . . ." (Pet. at 20-21.) *Chemetall*, however, stands for the exact proposition underlying this case – specifically, that an appellate court may review a summary judgment order after a trial occurred, when the ruling was based on a pure question of law. Similarly, Petitioner argues that *Avitia v. Metro. Club*

of Chicago, Inc., 49 F.3d 1219 (7th Cir. 1995) is irrelevant because "nothing in *Avitia* suggests that a district court may raise a new issue after trial that Rule 50(b) bars a party from raising on its own . . . ." (Pet. at 21.) Yet, *Avitia* held that "a judge may reexamine his earlier ruling . . . if he has a conviction at once strong and reasonable that the earlier ruling was wrong, and if rescinding it would not cause undue harm to the party that had benefitted from it." *Avitia*, 49 F.3d at 1227. Thus, the Seventh Circuit cited *Avitia* in support of the District Court's ability to reconsider its earlier denial of summary judgment, an issue that is exactly "on point."

2. A district court may reconsider a denial of summary judgment at any time prior to the entry of a final judgment.

Although Petitioner does not raise this issue in its Petition, it is clear the District Court committed no error in reconsidering its prior denial of summary judgment after trial. Absent entry of final judgment, any "order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Fed. R. Civ. P. 54(b). It is well-established that orders denying motions for summary judgment are not final orders, but merely interlocutory orders that may be reconsidered any time prior to the entrance of a final judgment. The District Court acted within its discretion in reconsidering its previous denial of summary judgment and Petitioner wrongly asserts a basis for *certiorari* when it claims that the Seventh Circuit allowed the District Court to "raise a new issue to overturn the jury verdict" thereby crafting an opinion that "squarely conflicts with

published decisions from at least five other circuits." (Pet. at 18.)

Even Courts of Appeals that Petitioner contends are at odds with the Seventh Circuit's decision have held that a prior denial of summary judgment may be reconsidered after trial. For example, the Fifth Circuit upheld the district court's *sua sponte* reconsideration and granting of summary judgment following a jury trial, explaining: "[B]ecause the denial of a motion for summary judgment is an interlocutory order, the trial court is free to reconsider and reverse its decision for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of the substantive law." *McKethan v. Texas Farm Bureau*, 996 F.2d 734, 738 n.6 (5th Cir. 1993). Similarly, the Third Circuit found that the district court committed no error in considering a motion for summary judgment after a mistrial, noting: "If there are no issues of material fact and a party is entitled to judgment as a matter of law, judgment may be awarded at any time, even after trial, under Rule 56 or under Rule 50." *Ross v. Hotel Employees & Rest. Employees Int'l Union*, 266 F.3d 236, 243 (3d Cir. 2001). *See also Geffon v. Micrion Corp.*, 249 F.3d 29, 38 (1st Cir. 2001) (recognizing that previous denials of summary judgment, as interlocutory orders, remain open to trial court reconsideration); *Conkling v. Turner*, 18 F.3d 1285, 1296 (5th Cir. 1994) (finding no impropriety in a district court's decision to reverse itself, after having originally denied summary judgment, then later granting judgment on the same issues pursuant to its *sua sponte* reconsideration after trial); *Oulds v. Principal Mut. Life Ins. Co.*, 6 F.3d 1431, 1435 (10th Cir. 1993) (finding no error when, after trial, defendant moved the district court to

reconsider its earlier denial of summary judgment and, in doing so, the district court found in favor of defendants).

Because Petitioner can raise no legitimate challenge to the District Court's authority to reconsider its prior interlocutory rulings, Petitioner attempts to create a circuit split by citing completely inapposite case law. For example, Petitioner cites *Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891 (11th Cir. 2004) for the proposition that the District Court does not have the authority under Rule 50(b) to rule *sua sponte* on issues not raised by the parties in their briefs. *Celebrity Cruises*, however, held that the district court did not have authority to grant judgment as a matter of law "based upon a lack of evidence regarding ***a factual issue*** never raised by any defendant before the trial and never addressed by anyone in any way before submission of the case to the jury." *Id.* at 904 (emphasis added). *Celebrity Cruises* is inapplicable to the instant case because unlike the court in *Celebrity Cruises*, the District Court here reconsidered a question of law, which is entirely appropriate. *See also Kutner Buick, Inc. v. American Motors Corp.*, 868 F.2d 614 (3d Cir. 1989) (making no mention of a district court's authority to reconsider a motion for summary judgment after trial); *Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168 (5th Cir. 1985) (same).

Petitioner's reliance on *American & Foreign Ins. Co. v. Bolt*, 106 F.3d 155, 160 (6th Cir. 1997) and *Murphy v. City of Long Beach*, 914 F.2d 183, 186 (9th Cir. 1990) is similarly misplaced. Petitioner cites both cases for the proposition that a district court may not consider issues raised in a Rule 50(b) motion that were not raised in a party's Rule 50(a) motion. However,

these rulings emphasized the necessity to afford opposing counsel an opportunity to remedy a claimed *evidentiary* deficiency. Neither case limited a district court's power to enter judgment on a pure question of law after trial. Accordingly, Petitioner's contention that a circuit split exists is purely fiction.

Finally, Petitioner contends that the Seventh Circuit's opinion stands for the "principle that a district court is entitled to raise a new issue that Rule 50(b) would bar a party from raising" and therefore, creates an issue that "without resolution . . . [will cause] the lower courts [to] continue to disagree over a district court's authority to overturn a jury verdict." (Pet. at 21.) Despite Petitioner's belief that the Seventh Circuit is unfamiliar with Rule 50's application, it should be noted that the Seventh Circuit regularly recognizes that "a trial judge is authorized to grant a Rule 50(b) motion for judgment notwithstanding a jury verdict only if the moving party has moved previously for a directed verdict under Rule 50(a) at the close of the evidence" and "only on grounds advanced in the pre-verdict motion." *Brooks v. O'Leary*, No. 93-3559, 1994 U.S. App. LEXIS 23942, at *6-7 (7th Cir. Aug. 30, 1994) (unpublished opinion). *See also Parts and Elec. Motors, Inc. v. Sterling Elec., Inc.*, 826 F.2d 712, 716 (7th Cir. 1987) (recognizing that to "preserve the issue . . . for judgment n.o.v. purposes, [party] would have had to identify the point distinctly and specifically in a motion for directed verdict"). As such, there is no split between the Courts of Appeals with respect to the application of Rule 50 or Rule 56 and, therefore, there is no justification for the granting of *certiorari*.

3. The lower courts' actions did not prejudice Petitioner.

Finally, Petitioner argues that it was prejudiced by the lower courts' decision in two ways: (1) it was unfairly surprised by the new theories considered by the District Court; and (2) the District Court and the Seventh Circuit failed to consider favorable trial evidence demonstrating the Respondent's connection to Petitioner's losses. Because the question of law at issue had been raised and considered by the parties and District Court throughout the litigation, both these contentions are without merit.

First, any suggestion that Petitioner was somehow unduly surprised by the District Court's interpretation of the phrase "resulting from" – an interpretation promoted by Respondent throughout the underlying litigation – is disingenuous at best. It is without dispute that Petitioner received notice of the District Court's intention to reconsider its prior rulings thereby barring its prejudice assertions. As stated in the District Court's October 12, 2007 order:

> The issue which [the] decision addressed – the meaning of the indemnification agreement – was exhaustively briefed in pretrial motions. And the decision did not rely on new legal or factual material. Also, after [the court] decided to reverse [itself], [the parties were notified]. [Petitioner] did not ask for an opportunity for briefing or oral argument, and the parties indicated that [the court] should issue the decision and that they would present legal arguments after its release.

See DI 406 at pp. 2-3 *filed* October 12, 2007. Thus, the District Court provided Petitioner the opportunity to argue its contentions regarding the causation standard. Moreover, when Respondent filed its post-verdict motion to reconsider denial of its pre-trial motion for summary judgment, Petitioner chose to sleep on its rights. Instead of filing a substantive response, it simply objected to Respondent's motion and filed a wholly frivolous Rule 11 motion. *See* DI 371 *filed* Apr. 9, 2007. Having passed on its opportunity to have its day in court, Petitioner cannot be allowed to now complain that it lacked the opportunity to be heard.

Second, because HK was never entitled to a jury trial, any purported failure to consider "trial evidence favorable to HK" is of no import. (Pet. at 26.) "Judges, not juries, decide questions of law" and when a matter is resolved on a question of law "the jury never gets a crack at deciding the outcome." *Gramercy Mills, Inc. v. Wolens*, 63 F.3d 569, 571 (7th Cir. 1995). Accordingly, failure to consider trial evidence is irrelevant. *See also Indiana Lumbermens Mut. Ins. Co. v. Timberland Pallet & Lumber Co., Inc.*, 195 F.3d 368, 375-76 (8th Cir. 1999) (finding no prejudice despite district court error in declaring jury advisory because the judgment made clear that the district court "decide[d] questions of law on the basis of undisputed facts"); *Quick v. American Steel & Pump Corp.*, 397 F.2d 561, 564 (2nd Cir. 1968) (holding that "since the plaintiff [was] entitled to recover as a matter of law, errors in the admission of evidence . . . are irrelevant.").

B. Petitioner Waived Its Right To Argue The Applicability of *Reeves* and the Seventh Amendment.

It is well-settled that "ordinarily this Court does not decide questions not raised or resolved in the lower court." *Patrick v. Burget et al.*, 486 U.S. 94, 99 (1988) (stating "[t]his Court usually will decline to consider questions presented in a petition for *certiorari* that have not been considered by the lower court."). *See also Grupo Mexicano De Desarrollo v. Alliance Bond Fund*, 527 U.S. 308, 319 (1999) (refusing to consider respondent's *Erie* argument because it "was neither raised nor considered below"); *United States v. O'Hagan*, 521 U.S. 642, 677 (1997) (refusing to consider claim neither raised in briefs before appellate court nor addressed by that court); *United States v. Mitchell*, 445 U.S. 535, 546 n.7 (1980) (refusing to consider several of respondents' claims because they had failed to raise them in the court below).

Yet, in arguing that summary judgment was improperly granted, Petitioner resorts to arguments and theories that were not advanced below. For example, Petitioner did not raise any arguments with respect to violations of its Seventh Amendment rights until filing its petition for rehearing with the Seventh Circuit. Nor did it assert the applicability of *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000) in any of the lower court proceedings. As such, Petitioner should now be precluded from attacking the lower courts' decisions on these new grounds. *See United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001) (noting that "[a]lthough in some instances [this Court has] allowed a respondent to defend a judgment on grounds other than those pressed or passed upon

below, it is quite a different matter to allow a petitioner to assert new substantive arguments attacking, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it.") (internal citations omitted); *Microsoft Corp. v. United States*, 530 U.S. 1301, 1301 (2000) (recognizing "[a] court of appeals proceeding would likely narrow, focus and initially decide the legal issues now presented here.") (Breyer, J., dissenting from denial of direct appeal).

C. The Decision Of The Seventh Circuit Does Not Conflict With *Reeves*.

Petitioner's contention that the Seventh Circuit's decision conflicts with *Reeves* is misguided and too expansively reads the purported "uniform rule" adopted by this Court. Petitioners promote an interpretation of *Reeves* that would require district courts to review all evidence in the trial record when granting any judgment based on a matter of law. (Pet. at 23.) *Reeves*, however, did not address Rule 56, which is the rule implicated in the District Court's decision at issue. Rather, *Reeves* limited its discussion to the type of evidence that should be considered when resolving a motion brought pursuant to Rule 50. Thus, while Petitioner asserts that the District Court and the Seventh Circuit violated the dictates of *Reeves* by failing to draw all reasonable inferences from the trial evidence in Petitioner's favor, *Reeves* requires only that when courts are resolving a ***Rule 50*** motion, consideration be given to all *factual evidence* placed before the jury that may support the nonmoving party's position. 530 U.S. at 153.

Further, this case is not, as Petitioner contends, factually similar to *Reeves*. Although Petitioner maintains that the "only material distinction between this case and *Reeves* is that in *Reeves* the Court selectively considered some of the trial evidence, while in this case the lower courts determined the trial was an irrelevance," the distinction is critical. (Pet. at 24.) In *Reeves*, the district court was reversed because the court did not consider all the trial evidence even after the petitioner established a *prima facie* case of discrimination and also "creat[ed] a jury issue as to the falsity of the employer's explanation . . . ." *Reeves*, 530 U.S. at 151. Thus, in *Reeves*, because there was a factual dispute, there was a necessity for a trial and a function for the jury to perform – namely, to make credibility determinations, weigh the evidence and draw legitimate inferences from the facts presented. *Id.* at 150. *Reeves* determined that the plaintiff presented a legally sufficient evidentiary basis from which a reasonable jury could conclude that he was a victim of discrimination. *Id.* at 151. Here, because the only issue to resolve was a question of contract interpretation – the resolution of which falls exclusively to the court – there was no need for a trial, and therefore, no need to consider trial evidence. As such, the Seventh Circuit's opinion does not conflict with United States Supreme Court precedent.

D. The Decision Of The Seventh Circuit Does Not Infringe Upon Petitioner's Seventh Amendment Rights.

Petitioner's argument that the trial court improperly dismissed its claims in light of the fact that it had a triable issue of fact and thereby deprived it of

its Seventh Amendment rights, is without merit and is not a significant issue under Supreme Court Rule 10.

First, it is well-established that the principal purpose for which *certiorari* jurisdiction exists is to resolve conflicts among United States Courts of Appeals and state courts concerning the meaning of provisions of federal law. *Braxton v. United States*, 500 U.S. 344, 347 (1991). To this end, *certiorari* should not be granted except in cases involving (1) the settlement of issues that are of importance to the public, as distinguished from those issues only of importance to the parties; and (2) real and embarrassing conflicts of opinion and authority between Courts of Appeals. *Rice v. Sioux City Mem. Park Cemetery*, 349 U.S. 70, 74 (1955). No such conflict exists in the instant case because Petitioner presents no issue of national importance, instead seeking *certiorari* solely for the limited purpose of correcting what it believes to be the District Court's misapplication of trial evidence. As such, a ruling by this Court would not implicate considerations greater than the limited concerns of the parties at issue.

Second, Petitioner asserts that it was denied its Seventh Amendment right to trial because the District Court and the Seventh Circuit improperly weighed, or failed to consider, trial evidence regarding Respondent's culpability with respect to the design of a faulty material handling system. Looking at the undisputed evidence, however, the District Court and the Seventh Circuit determined that under no factual scenario could Respondent be found to have "caused" Petitioner's injuries because Petitioner entered into a contract to build IBP's system ***after*** it acquired Eaton-Kenway and ***after*** engaging in extensive and exclusive

negotiations with IBP. Because there was no issue of fact to be tried, summary judgment was appropriate. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). As such there can be no Seventh Amendment violation because under federal standards, "[n]either a summary judgment nor the direction of a verdict infringes the right to a jury trial preserved by the Seventh Amendment to the Constitution where the question is one of law." *Whitsell v. Alexander*, 229 F.2d 47, 49 (7th Cir. 1956) (*citing Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 320 (1902)).

E. The Seventh Circuit's Decision Properly Affirmed The District Court's Order Granting Summary Judgment.

It is telling that Petitioner does not explain the specific basis for the District Court's summary judgment ruling. For example, not once does Petitioner acknowledge that summary judgment was granted because Petitioner could not establish, as a matter of law, that Respondent caused its losses. Nor does Petitioner attempt to defeat the summary judgment ruling by directing this Court to disputed material facts that could support a finding that it met its burden on causation.

Both the District Court and the Seventh Circuit determined that summary judgment was the proper mechanism through which to dispose of this case. Instead of challenging the legal analysis that led the lower courts to this conclusion, Petitioner inexplicably argues that there was sufficient evidence to support the jury verdict. The issue on appeal was not the sufficiency of evidence or the integrity of the jury verdict, however. It was a question of state law –

namely, whether Petitioner was entitled to indemnification under the Asset Purchase Agreement for losses sustained on a contract that it voluntarily entered into and performed after acquiring Eaton-Kenway.

To determine whether Petitioner could demonstrate that Respondent caused its losses, the District Court and the Seventh Circuit were required to interpret the phrase "resulting from" as it appears in the Asset Purchase Agreement. Noting its obligation to avoid a contract interpretation that leads to absurd results, the District Court recognized that in the absence of clear and unequivocal language, an indemnification agreement should not be construed to require indemnification for conditions not under the control of the indemnitor. *Hortman v. Otis Erecting Co.*, 322 N.W.2d 482, 486 (Wis. Ct. App. 1982) (noting an indemnification agreement should not be construed to require indemnification for conditions or operation not under the control of the indemnitor unless clearly provided). Yet, this is exactly what the District Court's original interpretation did. As the court explained:

> Because Articles 10.1 and 10.2 are mirror provisions, "resulting from" must have the same meaning in each provision. And if, as [Petitioner] contended and in substance I previously found, one party's loss must be indemnified if it would not have occurred "but for" some action of the other, no matter how remote the action from the loss and no matter what intervening acts occurred, Articles 10.1 and 10.2 would swallow one another and lead to absurd results. Each indemnification provision

> would be so inclusive that the parties would have to indemnify each other for virtually any loss arising from a claim relating to any asset transferred by [Respondent] to [Petitioner].

(Pet. App. at 24a-25a.)

Upon reconsideration, the District Court found that if its previous interpretation stood, there would no economic incentive for Petitioner to perform its obligations in good faith because under almost any circumstance, Respondent would be required to indemnify Petitioner. To avoid such consequences, the District Court properly ruled that Respondent must indemnify Petitioner "only where [Respondent] or Eaton-Kenway's acts or omissions (or a pre-closing occurrence) directly gives rise to a claim against [Petitioner]." (Pet. App. at 27a.)

The Seventh Circuit agreed with the District Court's analysis, finding that in order to break out of the "ridiculous circle" Petitioner's interpretation created, the indemnification provision must be narrowly construed. (Pet. App. at 7a.) The Seventh Circuit further noted that the District Court's allocation of responsibility was in accordance with Wisconsin state law and Seventh Circuit precedent. For example, in *Krueger Int'l, Inc. v. Royal Indem. Co.*, 481 F.3d 993, 996 (7th Cir. 2007), the Seventh Circuit held that under Wisconsin law unless a contract contains "express language[,] an indemnitor will not be found to have agreed to indemnify an indemnitee against the consequences of the breach of a contract that the latter signs after the indemnity contract . . . goes into effect." (Pet. App. at 8a.) In so holding, *Krueger* sought to avoid the "severe moral hazard" that

may arise if an incentive existed to commit the act indemnified against simply because the cost was shifted to the indemnitor. (*Id.*)

Here, the Seventh Circuit found that such a hazard would exist if Petitioner's interpretation of the indemnification provision stood because "[t]hinking that it would be indemnified for any losses on its contract with IBP, [Petitioner] had a diminished incentive to try to minimize its potential liability for such losses in negotiating the terms of the contract." (Pet. App. at 9a.) Thus, to avoid such consequences, the Seventh Circuit properly held that indemnification did not extend to the consequences of activity that are within the control of the party seeking indemnification. Because Petitioner, in negotiating and attempting to perform the March 23rd contract had the last clear chance to limit its exposure to liability, Petitioner's indemnification claim was barred as a matter of law. *Foskett v. Great Wolf Resorts, Inc.*, 518 F.3d 518, 524 (7th Cir. 2008) (applying Wisconsin law); *Dykstra v. Arthur G. McKee & Co.*, 301 N.W.2d 201, 204 (Wis. 1981). Accordingly, the District Court rightly granted, and the Seventh Circuit properly affirmed, summary judgment in favor of Respondent.

CONCLUSION

Petitioner fails to establish any compelling reasons for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully Submitted,

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